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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-651

PETER J. BRENNAN,
SECRETARY OF LABOR,

Petitioner,

v.

GREYHOUND LINES, INCORPORATED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, under the Age Discrimination in Employment Act, a bus company that defends its refusal to hire older inter-city bus driver applicants must prove that all or substantially all applicants could not perform safely or that it has a rational basis in fact to believe

that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers and others.

2. Whether this Court should grant certiorari to review the finding of the Court of Appeals that Greyhound has established an adequate factual basis to prove that there is a potential increase of risk of harm to its passengers and others which will be incurred by the elimination of its maximum hiring age for new inter-city bus drivers.

STATEMENT

The respondent, Greyhound Lines, wishes to bring to this Court's attention other facts material to the consideration of the questions presented. Throughout the trial of the case the witnesses for the Secretary of Labor stressed that the proper test for the evaluation of new inter-city bus driver applicants should be functional age, rather than chronological age. (Tr. 474, 746, 1771-1772, 1908).[1] However, none of those experts could adequately define functional age and they agreed that the best indication of that measure was chronological age. (Tr. 843, 1771-1772, 1834-1835, 1875, 1918). The Secretary's experts also testified that they could not say yes or no as to whether a disruption of Greyhound's hiring policy for new inter-city bus drivers would adversely effect public safety and admitted that

[1] "App." refers to the appendix to this memorandum. "Petitioner's App." refers to the appendix to the Secretary of Labor's Petition for Certiorari. "Tr." refers to the transcript of trial proceedings filed in the Court of Appeals.

it was a matter of "flipping a coin". (Tr. 878-881, 1787). Greyhound's experts testified that the implementation of the Secretary of Labor's demands regarding Greyhound's hiring policy for new inter-city bus drivers would adversely effect public safety by forcing Greyhound to hire individuals who could not achieve the optimum of safety and experience under the unusual working conditions of the extra-board system. (Tr. 335, 338-339, 341-345, 352-353; Petitioner's App. A, p. 9A-11A). The United States Court of Appeals for the Seventh Circuit accurately summarizes the unusual physical, mental and emotional stresses experienced by newly employed inter-city bus driver applicants. (Petitioner's App. A, 7A-11A). Greyhound also proved at trial that the safest driver is one who has sixteen to twenty years of driving experience and is between fifty and fifty-five years of age. (Tr. 640, 644). It was uncontradicted that no new inter-city bus driver applicant could attain this status if he were over forty years of age at the initial time of employment by Greyhound. (Tr. 352-353). There was evidence presented that, beginning at the age of thirty-five, the human body undergoes certain physical and sensory degenerative changes which adversely effect a driver's safety. (Tr. 318-353). The Secretary of Labor's witnesses agreed that these changes take place and that no conclusive medical tests exist which can accurately detect the presence of these problems in all drivers. (Tr. 843, 1771-1772, 1834-1835, 1875).

It became apparent during the arguments before the trial court on the Petition for Reconsideration that new empirical evidence had been discovered by the attorneys for Greyhound Lines, which the government had been

preparing during the trial of the case directly bearing on the issues at trial. (App. A, p. 2A-9A). The data was compiled in "A Study of the Relationships Among Fatigue, Hours of Service and Safety Operations of Truck and Bus Drivers". (App. A, p. 2A).

Two primary contributors to the compilation of this study were Dr. John W. Eberhardt and Mr. Kenneth Pearson, both who testified as experts on behalf of the Secretary of Labor during the trial. (App. A, p. 2A). The study clearly contradicts the contentions of the Secretary of Labor by statistically demonstrating that older drivers become fatigued more quickly and consequently experience a greater proportion of accidents after prolonged driving, than younger drivers. (App. A, p. 4A; Petitioner's App. A, p. 11A-13A). The study also clearly supports Greyhound's position that the percentage of accidents decreased as the bus or truck driver's age increased from age thirty to the age group forty-one to forty-five but then generally increased from the forty-one to forty-five age group to fifty-six years of age. (App. A, p. 4A-5A; Petitioner's App. A, p. 11A-13A). This material was in the Secretary's possession during the trial of this case and was not disclosed by them for reasons unknown to Greyhound Lines. (App. A, p. 2A-3A). The matter was brought to the attention of the trial court during the rehearing and was mentioned by the Seventh Circuit Court of Appeals in the final opinion. (Id.).

REASONS FOR DENYING THE WRIT

1. The decision of the Seventh Circuit Court of Appeals has not weakened the effectiveness of the Age

Discrimination and Employment Act, but has served to accommodate the purposes of the Act with duties of public safety that are owed by a common carrier. The Court's holding that Greyhound Bus Lines need not show that all or substantially all bus driver applicants over forty could not perform safely, but that Greyhound's position that there is a potential risk of harm to its passengers and others which would be incurred by the elimination of its maximum hiring age is well founded and grounded on an adequate factual basis does not conflict with the decisions of other Federal Circuits or this Court. As the opinion of the Court of Appeals states quite clearly the decision of the Fifth Circuit in *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1971), interprets sex discrimination issues under Title 7 of the 1964 Civil Rights Act. (Petitioner's App. A, p. 3A-4A). The *Weeks* decision involved a telephone company's violation of the Civil Rights Act by refusing to hire a woman for the position of switchman because of the contention that they could not meet the job requisite of being able to lift weights in excess of thirty pounds, 408 F.2d 228, 232. The decision did not deal with genuine matters of public safety as in the case at bar. Moreover, the decision of the Court of Appeals is entirely consistent with the decision of the Tenth Circuit in *Spurlock v. United Air Lines, Inc.*, 475 F.2d 216 (10th Cir. 1972). That decision is directly related to the public safety considerations which are the essence of Greyhound's business. The Court of Appeals was correct in applying the standard of proof enunciated by the Tenth Circuit in the *Spurlock* decision based upon the compelling concerns for public safety involved herein.

The decision of the Court of Appeals is also consistent with another United States District Court's opinion under precisely the same circumstances, *Hodgson v. Tamiami Trail Tours, Inc.*, 4 F.E.P. cases 728 (S.D. Fla. 1973), appeal pending, No. 72-2373 (C.A. 5).

There were no dissenting opinions filed with the decision of the Court of Appeals below and the Court's opinion does not conflict with any decisions of this Court on the same subject. There is no necessity for this Court to review by certiorari the decision of the Seventh Circuit Court of Appeals since the issues decided therein are based upon sound judicial logic and a common sense application of the existing law to the facts of this case.

2. This Court should not grant certiorari in this case simply to review questions of fact where no Constitutional issue is involved. The ruling of the Seventh Circuit Court of Appeals is based on the particular facts and evidence which was presented to the trial court and does not raise any important questions of federal law which need to be settled by this Court. Obviously whether an age forty hiring policy by an employer complies with the Age Discrimination in Employment Act must be decided on a case by case basis.

During the trial of this case all the statistical evidence and empirical studies available to Greyhound Lines regarding the safety of inter-city bus drivers were presented. The Court of Appeals correctly found that the only way Greyhound could create statistics which might satisfy the Secretary of Labor would be to adopt a trial and error method and experiment with the lives of the public. Common sense and judicial prudence could never require the development of this kind of evidence.

It is of great significance that the only statistical and empirical data which was withheld from evidence was done so by the Secretary of Labor. (App. A, p. 2A-9A). This driver safety study, which was mentioned in the opinion of the Court of Appeals, clearly shows that the most recent U.S. Government report supports Greyhound's position of not hiring new inter-city bus drivers over the age of thirty-five. (Petitioner's App. A, p. 11A-13A). As the Secretary of Labor has pointed out in his brief, "the production of weak evidence when strong (evidence) is available can lead only to the conclusion that the strong would have been adverse", *Interstate Circuit v. United States,* 306 U.S. 208, 226 (1938). Therefore, all inferences in this regard should be against the Secretary of Labor.

3. The decision of the Seventh Circuit Court of Appeals does not frustrate the operation of the Age Discrimination and Employment Act of 1967, but actually follows the express intent of the statutory drafters in recognizing that there are bona fide occupational qualifications reasonably necessary to particular businesses, 29 U.S.C. 623 (F); Calendar No. 707, Report No. 23, Accompanying S. 803 Committee of Labor and Public Welfare, U.S. Senate 90th Congress First Session, November 4, 1967, p. 7. The Act itself states that one of its purposes is to prohibit "arbitrary age discrimination in employment", 29 U.S.C. 621(b). The District Court did not find that Greyhound's policy was arbitrary but only that its evidence did not meet the high standard of proof required in a sex discrimination case under the *Weeks,* supra., rule. (Petitioner's App. D, p. 27A, 28A, 33A). The application of the Statute to the facts, by the Court of Appeals has

produced a result which is entirely consistent with the statutory scheme and the decisions of other Federal Circuits on this subject. The Seventh Circuit Court of Appeals has recognized that the evidence presented in this case clearly demonstrates that Greyhound is acting in good faith by not hiring new inter-city bus drivers over the age of thirty-five since the countervailing considerations for public safety are immediate and genuine and supported by evidence. (Petitioner's App. A, p. 1A-13A). Their decision in this case is correct and need not be reviewed by this Court in further detail.

In sum, no question is presented by the petition that merits review by this Court and the petition should be denied. Whether the Court of Appeals reached a proper factual conclusion on the record before it is not a "certiorari worthy" question. At any rate, its factual conclusions are correct. However, we do not deem it appropriate in an answer to a certiorari petition to so demonstrate because this would require a long and detailed analysis of the evidence.

CONCLUSION

Based upon the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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January 2, 1975

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES D. HODGSON, etc.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 69 C 2227
	)	
GREYHOUND LINES, INC.,	)	Mar. 1, 1973
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
Before
HON. JAMES B. PARSONS
Judge

JOSEPH R. BETZ
Official Reporter
UNITED STATES DISTRICT COURT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604
HArrison 7-5210

* * *

[27] that a valuable and worthwhile decision will be rendered that will aid this Court and others presented with this problem.

If there is to be this rule of law applied to the public transportation industry, then certainly the Fifth Circuit, which decided the other momentous decisions in this field, will make a worthwhile and just decision.

Now, your Honor, there is something that has come to my attention yesterday. Your Honor knows that two of the witnesses relied upon by plaintiff, two witnesses brought here from Washington, D.C., Dr. Eberhardt and Mr. Kenneth Pearson, – Dr. Eberhardt, he is the one who said – well, let me make sure I say it right. Yes, Dr. John W. Eberhardt, and I quote from his testimony, after admitting that there is no test, no examination known that can determine functional age:

"The best index at this time across the board for functional age for the average individual would be chronological age.

"Q Is it safe, Dr. Eberhardt, to hire new drivers for Greyhound over the age of 40, up to the age of 65?

[28] "A I think that is a flipping of the coin."

That is Dr. Eberhardt. Then Mr. Pearson, who went by statistics and said, "Well, they are doing a good job now. The older drivers aren't having any more accidents than the younger ones," that proves our point but, your Honor, something nobody told you and nobody told me and nobody volunteered is that they had a study going on at the very time they came into this court and testified, a study, and I have it here. I got it yesterday.

"A Study of the Relationships Among Fatigue, Hours of Service and Safety of Operations of Truck and Bus Drivers," and it was February 20th when my client got his copy, a study, your Honor, which nobody told you

about, nobody told me about, that we labored here without knowing anything about, sponsored by "The Bureau of Motor Carrier Safety, Federal Highway Administration, United States Department of Transportation, Washington, D.C.

It commenced in June of 1971 and was completed in November of 1972. Nobody told us about this. I spent an hour *this morning going through this book*. I just want your Honor to hear some of the findings of the Human Factors Research, Incorporated, a study
[29] sponsored by the Department of Transportation. First of all, on the first page under "Acknowledgments" it says:

> "We wish to acknowledge the helpful suggestions and constructive criticisms of Mr. Kenneth L. Pearson" several others "And Dr. John W. Eberhardt."

They never told us about this. Listen to some of the findings, your Honor – by the way, in this exhaustive work here, your Honor, they studied surveys by McFarland, our same Dr. McFarland, his work of 1963, McFarland and Mosely, they say, and I quote:

> "The conclusions reached by McFarland and Mosely are not compelling," commenting on Dr. Ross McFarland and his studies. They say:
>
> "Q How do drivers typically cope with fatigue? In an open response situation the drivers were asked to describe what they typically do to cope with fatigue after long hours of driving. Not surprisingly, the most common, the most frequent response was 'Stop, pull over and go to sleep'."

That was one of the points we made on cross examination of some of the witnesses. They they go on:

"This is a common practice among all drivers
[30] except bus drivers, who can't do it."

They say in other tests – and, your Honor, these charts and these graphs, I just wish I could introduce this into evidence and let you read it yourself, and one of the things I am going to ask the Court to do is not only grant our motion for reconsideration but to reopen this case so that we may be able to call or take depositions of some of these scientists who have conducted this very examination, this very broad scale and far-reaching study at the behest of the Department of Transportation. I want to go to California and take those depositions and bring those to your Honor.

But they say:

"The results are consistent with the hypothesis that older drivers become fatigued more quickly and, consequently, experience greater proportions of accidents after prolonged driving than younger drivers."

That is in the book. It is in the book, your Honor. Let me move on. You know, we told you, we tried to illustrate with all the people we could – we brought you people from every related industry to the bus industry and we told you time after time after time,
[31] and our witnesses told you, that you had to tie together age and experience – age and experience – and we said it takes sixteen years for the man to reach the safest point of experience and his age is usually 45 to 50, something of that nature. I am just talking off the top of my head at the moment.

Then look here: Here is a study done by The Human Resources Institute for the Department of Transportation. What does it show?

"Accident Rate by Age and Experience." What is the lowest accident rate? After ten to fourteen years of experience. At what age? Forty-six to fifty.

This is precisely what we have been trying to tell your Honor ten to fourteen years of experience as a professional driver, 46 to 50 years of age, and the accident rate is 1.9. That is the lowest of all. It is precisely what we were trying to show you.

This is not my evidence. This is the Department of Transportation. The witnesses came here and didn't tell us about this.

"We have seen a good deal of evidence –" it says here – "that prolonged driving results in significant reductions in the level of psychophysiological arouse-
[32] ment," and you heard about that in this case.

They do heart beat tests and blood pressure tests and they show how it affects the older man. They say there are significant increases in error rates. They say:

> "The results of the accident analysis shows that older drivers tend to have proportionately more of their accidents after about five hours on the road than did younger drivers. They fatigue quicker. They become more accident prone after five hours."

They didn't tell us about this. Wouldn't I have loved to have known about this before I rested my case and brought these people to you?

I submit to you, your Honor, this is newly discovered evidence. The witnesses came here and didn't mention it, didn't tell us about it, and we ought to have a right to present this evidence to you.

Your Honor, I am somewhat feeling the effects of fatigue myself at the moment and I –

THE COURT: You are too young for that, Mr. Preddy.

MR. PREDDY: Well, I am 44 years old, Judge and –

THE COURT: That is beautiful youth.

[33] MR. PREDDY: Well, thank you, sir. Maybe if I were fifty years old I couldn't recuperate this fast. I don't know.

THE COURT: No, no.

MR. PREDDY: But, your Honor – this is a nut shell, just a little bit, just the skim on the top of what I want to present to your Honor. I want to come back, I want to write out in a meorandum [sic] of law and point out where we think there are errors that have been made in law and fact. I want to give your Honor a reasonable opportunity to review this.

Your Honor, you said in this order there has got to be certainty, or you worded it that way, so it can reasonably be construed that you burdened us with that burden of proof, you did, your Honor, and, your Honor, when Mr. Drucker was arguing about the fine Dr. McFarland, and it is on the record, who was it who said, well, there were a lot of conflicts and contradictions in his testimony? Your Honor, you did.

Your Honor, the last hearing I had any notice of, who said, "I think this whole concept of aging needs scientific evaluation deeper than has been done even by the wonderful scientists you presented"? Your Honor, you did.

[34] What is the big rush, your Honor? What is the big rush? Can't we do this right? Why does the plaintiff demand now for us to be pushed into this? They took three years to prepare their case. They took depositions all over the place. Now they demand that you act immediately.

Can't we wait, your Honor? Can't we file these briefs I want to file for you? Can't we have you reconsider this, and then if your own good judgment we are wrong, then we are wrong, and we will appeal. But I urge your Honor, don't make us take an appeal now. Please consider this. Please extend the stay until May the 4th as you originally ruled. Please do that.

I will do nothing else now until my time is up except work on this brief for your Honor. I earnestly urge it. I think, regardless of how you feel at the moment, that you may reconsider, and I want the opportunity to do this. Thank you.

THE COURT: May I inquire about one matter that is predominantly in my mind to which we have never addressed ourselves in this matter, and that is the intent of Congress – we are dealing with a congressional act and not with whether or not the Act of Congress was constitutional, we are dealing with a

* * *